

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ALLSTATE INSURANCE COMPANY,)
Plaintiff,) No. 08-508-HU
v.)
DAT THAI NGUYEN, THAI NGUYEN,)
VISION AUTO REPAIR CO., and) FINDINGS AND
T. N.) RECOMMENDATION
Defendants.)
)

Douglas F. Foley
Katie D. Buxman
Foley & Buxman
13115 N.E. 4th Street, Suite 260
Vancouver, Washington 98684
Attorneys for plaintiff

S. Michael Rose
Aubertine Draper Rose
1211 S.W. 6th Avenue
Portland, Oregon 97204
Attorney for defendant T.N.

William A. Davis
Davis Rothwell Earle & Xochihua
1900 Wells Fargo Center
1300 S.W. 5th Avenue
Portland, Oregon 97201
Attorney for defendant Thai Nguyen

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1 HUBEL, Magistrate Judge:

2 The matter before the court is defendant T.N.'s Motion to
 3 Dismiss or Abstain (doc. #10).

4 This is an insurance coverage action filed by Allstate
 5 Insurance Company, requesting that the court issue a declaratory
 6 judgment that Allstate is not obligated to defend or indemnify Dat
 7 Thai Nguyen and Vision Auto Repair in an action filed in the
 8 Circuit Court for Multnomah County by defendant T.N., T.N. v. Dat
9 Thai Nguyen, Vision Auto Repair Co., and Thai Nguyen, No. 0802-
 10 02075. Allstate alleges in the declaratory action complaint that it
 11 issued defendant Thai Nguyen a Landlord's Package insurance policy,
 12 but that defendants Vision Auto Repair and Dat Thai Nguyen do not
 13 qualify as Insured Persons as defined in the insurance policy.

14 Allstate has not attached a copy of the insurance policy to
 15 the complaint. Within the complaint, Allstate alleges that the
 16 policy provides as follows:

17 **Coverage X**

18 **Liability Protection**

19 **Losses We Cover Under Coverage X:**

20 Subject to the terms, conditions and limitations of this
 21 policy, **Allstate** will pay compensatory damages which an
insured person becomes legally obligated to pay because
 22 of **bodily injury, personal injury, or property damage**
 23 arising from a covered **occurrence**. We will not pay any
 24 punitive or exemplary damages, fines or penalties.

25 The terms "**Bodily Injury**," "**Insured Person**," "**Occurrence**,"
 26 "**Personal Injury**," "**Residence premises**," and "**you**" are defined as
 27 follows:

28 2. **Bodily injury** means physical harm to the body,
 29 including sickness, disability or disease...

27 * * *

1 6. **Insured person(s) means:**

2 a) if **you** are shown on the Policy Declarations as an
3 individual and **you** are a sole proprietor **you** and
3 **your** resident spouse.

4 b) if **you** are shown on the Policy
5 Declarations as a partnership or joint
6 venture, the named partnership or joint
7 venture, including any of its partners or
8 members individually while acting within
8 the course and scope of their duties in
8 connection with the ownership,
8 maintenance or use of the **residence**
8 **premises**.

9 c) if **you** are shown on the Policy Declarations as an
10 organization other than a partnership or joint
11 venture, the organization directors, trustees or
12 governors of the organization while acting within
12 the course and scope of their duties in connection
12 with the ownership, maintenance or use of the premises.

13 d) **your** employees, while acting within the course and
14 scope of their employment in connection with the
14 ownership, maintenance or use of the **residence**
15 **premises**.

15 This policy does not apply to **bodily injury**,
16 **personal injury** or **property damage** arising
17 from the conduct of any partnership, joint
17 venture or organization which is not named on
18 the Policy Declarations as the insured.

19 7. **Occurrence** means--

20 a) under **Coverage X-Liability Protection**, an
21 accident during the policy period, including
22 continued and repeated exposure to
23 substantially the same general harmful
23 conditions during the policy period, resulting
23 in **bodily injury**, **personal injury** or **property**
23 **damage** and arising from the maintenance or use
23 of the **residence premises**.

24 8. **Personal Injury** means damages resulting from:

25 a) false arrest; false imprisonment; wrongful
26 detention;

27 b) wrongful entry; invasion of rights of

1 occupancy; wrongful eviction;

2 c) libel; slander; humiliation; defamation of
3 character; invasion of rights of privacy.

4 * * *

5 11. **Residence premises** means **your** dwelling, other structures
6 and land located at the address stated on the Policy
7 Declarations.

8 * * *

9 14. **You** and **your** means the person(s), partnership, joint
10 venture, or organization specifically named on the Policy
11 Declarations as the insured.

12 Complaint ¶ 15.

13 The underlying T.N. case asserts claims for battery,
14 intentional infliction of emotional distress (IIED), and
15 negligence. The complaint alleges that on June 22, 2006, defendant
16 Dat Thai Nguyen ("Dat Nguyen") encountered T.N., a minor, and
17 demanded that she accompany him to Vision Auto Repair's premises,
18 where he raped her. The complaint alleges that Dat Nguyen used his
19 authority as the employee and/or agent of Thai Nguyen and his
20 position as manager of the residential complex where T.N. lived to
gain access to T.N. and to exert control over her, and further that
Dat Nguyen used Vision Auto Repair's surveillance equipment to plan
and conduct his assault on T.N. Thai Nguyen is allegedly the owner
of both the residential complex and Vision Auto Repair.

21 As part of the negligence claim, T.N. alleges that Vision Auto
22 Repair and/or Thai Nguyen knew or should have known that Dat Nguyen
23 was an individual with violent and aggressive propensities, and
24 that he was nevertheless hired as an agent or employee despite
25 defendants' knowledge or reasonable awareness of Dat Nguyen's prior
26 felony record and history of violent actions and sexual conduct.

1 Dat Nguyen was convicted of rape and sexual abuse on April 3,
2 2007, in Multnomah County. Dat Nguyen has not made an appearance in
3 the present case.

4 T.N. requests that the court abstain from exercising
5 jurisdiction over this case.

6 **Standards**

7 Under the Declaratory Judgment Act, 28 U.S.C. § 2201, a
8 federal court "may declare the rights and other legal relations of
9 any interested party seeking such declarations." The exercise of
10 jurisdiction under the Act is committed to the sound discretion of
11 the district court. Huth v. Hartford Ins. Co. of the Midwest, 298
12 F.3d 800, 802 (9th Cir. 2002), citing Wilton v. Seven Falls Co., 515
13 U.S. 277, 282-83 (1995). In deciding whether to exercise its
14 discretion under the Act, the court considers the so-called
15 Brillhart factors: 1) avoiding the needless determination of state
16 law issues; 2) discouraging litigants from forum shopping; and 3)
17 avoiding duplicative litigation. Government Employees Ins. Co. v.
18 Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc), citing
19 Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942). The
20 Brillhart factors are not exhaustive. Id. at 1225 n. 5.

21 While the Brillhart factors are the "philosophic touchstone
22 for the district court," 133 F.3d at 1225, the Dizol court
23 articulated other considerations that may be relevant, including
24 whether the declaratory action 1) will settle all aspects of the
25 controversy; 2) will serve a useful purpose in clarifying the legal
26 relations at issue; 3) is being sought merely for the purposes of
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1 procedural fencing or to obtain a res judicata advantage; and 4)
2 will result in entanglement between federal and state court
3 systems. Additionally, the court considers the convenience of the
4 parties and the availability and relative convenience of other
5 remedies. 133 F.3d at 1225 n. 5.

6 If there are parallel state proceedings involving the same
7 issues and parties pending at the time the federal declaratory
8 action is filed, there is a presumption that the entire suit should
9 be heard in state court. Id. at 1225. However, the pendency of a
10 state court action does not, of itself, require the district court
11 to abstain from granting declaratory relief. Id. There is no
12 presumption in favor of abstention in declaratory actions
13 generally, nor in insurance coverage cases specifically. Id.

14 **Discussion**

15 A. Duty to Defend and Duty to Indemnify

16 Under Oregon law, an insurer's duty defend is not identical to
17 the duty to indemnify, and the duty to indemnify is not completely
18 dependent upon the duty to defend. Ledford v. Gutoski, 319 Or. 397,
19 403 (1994); American States Ins. Co. v. Dastar Corp., 318 F.3d 881,
20 890 (9th Cir. 2003). The duty to defend derives from the allegations
21 of the complaint, see, e.g., Marleau v. Truck Ins. Exchange, 333
22 Or. 82, 91 (2001); the duty to indemnify derives from factual
23 determinations separate from the allegations of the complaint.
24 American States, 318 F.3d at 890.

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26 B. Application of Brillhart Factors

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1 1. Avoiding Needless Decisions of State Law

2 Allstate's original complaint requested that the court enter
 3 declaratory judgment in its favor on the ground that Dat Thai
 4 Nguyen and Vision Auto Repair were not "insured persons" under Thai
 5 Nguyen's insurance policy. Allstate now seeks to amend its
 6 complaint to request that the court enter judgment in its favor on
 7 a second ground, i.e., that the intentional acts exclusion in the
 8 insurance policy excuses Allstate from defending or indemnifying
 9 Dat Thai Nguyen and Vision Auto Repair.

10 The intentional acts exclusion in the insurance policy
 11 provides as follows:

12 **Losses We Do Not Cover Under Coverage X:**

13 1. **We** do not cover any **bodily injury, personal injury**
 14 **or property damage** intended by, or which may
 15 reasonably be expected to result from the
 16 intentional or criminal acts or omissions of, an
 17 **insured person**. This exclusion applies even if:

- 18 a. an **insured person** lacks the
 19 mental capacity to govern his
 20 or her conduct;
- 21 b. such **bodily injury, personal**
 22 **injury, or property damage** is
 23 of a different kind or degree
 24 than intended or reasonably
 25 expected; or
- 26 c. such **bodily injury, personal**
 27 **injury, or property damage** is
 28 sustained by a different person
 29 than intended or reasonably
 30 expected.

31 This exclusion applies regardless of whether
 32 or not such **insured person** is actually charged
 33 with, or convicted of a crime.

34 Proposed Amended Complaint ¶ 15, Affidavit of Douglas Foley,
 35
 36 Exhibit A.

37 The motion to amend is not opposed by defendants T.N., Vision Auto

1 Repair and Thai Nguyen, and is therefore granted.

2 The insurance policy at issue must be construed under state
3 law, see, e.g., Hoffman Const. Co. v. Fred S. James & Co., 313 Or.
4 464, 469 (1992), and determination of Allstate's duties to defend
5 and to indemnify are also matters of state law. Merleau, 333 Or. at
6 91.

7 The amended complaint in this case, and the underlying
8 complaint in state court, allege that Dat Thai Nguyen "was
9 convicted of Rape in the First Degree and Sexual Abuse in the
10 Second Degree on April 3, 2007 and Judgment was entered on April
11 24, 2007 in Multnomah County, Oregon." Amended Complaint, Foley
12 Affidavit, Exhibit A ¶ 10 (underlying complaint ¶¶ 5-6). Under
13 State Farm Fire & Casualty Company v. Reuter, 299 Or. 155, 163-64
14 (1985), Dat Nguyen's pleaded conviction conclusively establishes
15 that he acted intentionally.

16 Accordingly, under the policy exclusion, there is no coverage
17 for the acts of Dat Thai Nguyen. See Reuter, 299 Or. at 163, 165.
18 A declaratory judgment in this case will not require a "needless
19 determination" of state law or require the court to make necessary
20 factual determinations that are part of the underlying state court
21 case. This element of the Brillhart analysis does not favor
22 abstention.

23 2. Forum shopping

24 Federal courts should "generally decline to entertain reactive
25 declaratory actions." Dizol, 133 F.3d at 1225. "A declaratory
26 judgment action by an insurance company against its insured during
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1 the pendency of a non-removable state court action presenting the
2 same issues of state law is an archetype of what we have termed
3 'reactive' litigation." RobSac, 947 F.2d at 1372-73, overruled on
4 other grounds by Dizol, 133 F.3d at 1224. As discussed, Dat's
5 criminal conviction precludes coverage; this declaratory judgment
6 action does not present the same issues of fact or of state law
7 that will be resolved in the state court action.

3. Avoiding Duplicative Litigation

9 Allstate contends that the coverage issues in this case are
10 not germane to and will not be decided in the underlying
11 litigation. For the reasons stated above, I agree. None of the
12 Brillhart factors favors this court's abstention from the coverage
13 action while T.N. litigates her claims in the underlying state
14 court action.

Conclusion

16 Allstate's unopposed motion to amend (doc. # 21) is GRANTED.
17 T.N.'s motion to dismiss (doc. # 10) should be DENIED.

Scheduling Order

19 The above Findings and Recommendation will be referred to a
20 United States District Judge for review. Objections, if any, are
21 due December 13, 2008. If no objections are filed, review of the
22 Findings and Recommendation will go under advisement on that date.

23 If objections are filed, a response to the objections is due

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1 December 30, 2008, and the review of the Findings and
2 Recommendation will go under advisement on that date.

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4 Dated this 1st day of December, 2008.

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6 /s/ Dennis James Hubel

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8 Dennis James Hubel
United States Magistrate Judge

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